

Contracts Act which was urged on the learned judge A at the hearing, but ignored. It reads

"183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him, on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases:

- (a) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; and
- (b) where the principal, though disclosed, cannot be sued."

And as a matter of law, the respondent could have no cause of action, on the pleadings, against the appellant. As counsel for the appellant put it, the reliefs sought by the respondent are not capable of being enforced against the appellant.

Contrary to what the learned judge held, the issues were, with respect, before the court. The defence of the first defendant was filed before the summons-in-chambers. On both the statement of claim of the respondent and the defence of the first defendant, the issue was clearly the respondent's entitlement to be emplaced at a certain level in the revised scale of emoluments. It was a claim by an employee against his employer. It was a claim disputed by the employer. It was a matter strictly between employee and employer. The agent who engaged the employee for the employer even if it also supervised the work of the employee for the employer and against whom the employee had sought no reliefs, had no liabilities to meet.

As for the correspondence between the respondent and the appellant before the contract of employment was signed, which the respondent introduced in an affidavit and which was also urged on us, we admit to some difficulty in understanding its relevance. If it was sought by it to give another or an additional meaning to the contract of employment, it was inadmissible by section 92 Evidence Act. We agree, with respect, with the dictum of Lord Wilberforce in *Prenn v. Simmonds*⁽¹⁾ at page 241 that

"...evidence of negotiations, or of the parties' intentions, and a fortiori of Dr. Simmond's intention (that is, of one of the parties to the dispute) ought not to be received and evidence should be restricted to the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

If that was not the purpose for its introduction, then we do not, with respect, see how it could assist the respondent in resisting the application, or the court in coming to a decision.

For these reasons, we allowed the appeal with costs here and in the court below and we made an order in terms of the summons-in-chambers that the appellant be struck out from the writ.

Appeal allowed.

Solicitors: *Presgrave & Matthews; H.R. Sankey & Co.*

SYARIKAT SENG LIAN TRADING v. ROXY (MALAYSIA) SDN. BHD.

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Wan Suleiman F.J.)
December 7, 1977 and January 24, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 99 of 1977]

Practice and Procedure — Garnishment — Garnishee disputing liability — Whether Assistant Registrar can dispose of matter in summary manner — No consent by garnishee — Order should have been made for trial as in an action — R.S.C., 1957, O. 34 r. 9 and O. 45 r. 4.

In this case the respondents, a judgment creditor, had served a notice of garnishment on the appellants. The appellants denied owing any money to the judgment debtor. The Senior Assistant Registrar ordered that the issue of indebtedness be tried before her and eventually she found that the appellant, the garnishee, was indebted to the judgment debtor in the sum of \$74,676.46 and ordered the appellants to pay this amount to the judgment creditor. The appellants applied to the judge to set aside the proceedings but the application was dismissed. The appellants appealed to the Federal Court.

Held, allowing the appeal: as the garnishee disputed his liability in this case and as on the facts he had not consented to have the matter dealt with in a summary manner the learned Senior Assistant Registrar had no jurisdiction to try the issue in dispute and should have referred the matter to the judge for trial.

The following cases were cited in argument: *MacFoy v. United Africa Co. Ltd.* [1962] A.C. 152; *Lowe v. Love* (1878-9) 10 Ch. D. 432, 433; *Tiverton Estates Ltd. v. Wearwell Ltd.* [1974] 1 All E.R. 209, 214; *Mark T. McKee v. Evelyn McKee* [1951] A.C. 352.

FEDERAL COURT.

E *M. Sivalingam* (P. *Cumaraswamy* with him) for the appellant.

K. Anantham for the respondent.

Suffian L.P. (delivering the grounds of decision of the Court): We allowed this appeal and now give our reasons.

F Roxy (Malaysia) Sdn. Bhd. ("judgment creditor" and respondent before us) obtained judgment against P.J. TV and Densun (M) Sdn. Bhd. ("judgment debtor"). The judgment creditor thought that Syarikat Seng Lian Trading (garnishee and appellant before us) owed money to the judgment debtor, so they served a notice of garnishment on them, saying that all property to which the judgment debtor was entitled and which was or shall be under the control of the garnishee Syarikat was attached in its hands as garnishee. In due course the garnishee appeared in chambers before the Senior Assistant Registrar. The garnishee denied owing any money to the judgment debtor. The learned Senior Assistant Registrar ordered that the issue of indebtedness, if any, of the garnishee to the judgment debtor and the amount of the indebtedness be tried before her and that the garnishee produce all books and other relevant documents for the determination of this issue. Trial of this issue before the Senior Assistant Registrar in chambers occupied nine days between January 8, 1976, and April 2, 1976, at which the judgment creditor was represented by counsel and the garnishee not. In the event the learned Senior Assistant Registrar found that the garnishee was indebted to the judgment debtor and after a further enquiry ordered that the garnishee pay the judgment creditor \$74,676.46. That was on April 28, 1976.

The garnishee applied to the judge to set aside the proceedings before the Senior Assistant Registrar

and the order made by her. It said that the Rules of the Supreme Court had not been complied with. The judge dismissed the application.

The garnishee appealed to us.

It was said on the garnishee's behalf that the learned Senior Assistant Registrar had no jurisdiction to try the issue of liability of the garnishee, that she should have held that under the Rules of the Supreme Court she had only jurisdiction to settle issues by consent of parties, and once the issue had been settled the trial of the issue should have proceeded before a judge so that the garnishee could have had the benefit of pleadings and a proper trial.

As the garnishee disputed liability, Order 45 rule 4 is relevant. It reads:

"If the garnishee disputes his liability, the court or a judge may order that any issue or question necessary for determining his liability shall be tried or determined in any manner in which an issue in an action may be tried, or, with the consent of the parties, may dispose of the question between them in a summary manner."

In our judgment, here, as the garnishee disputed liability, the learned Senior Assistant Registrar had two alternative courses open to her: either

- (a) order that the issue of the garnishee's liability be tried in a manner in which an issue *in an action* may be tried (because of the words italicized, this means in our opinion a trial in open court before a judge); or
- (b) if the parties consented, dispose of the question between them in a summary manner, i.e., herself dispose of the question (this would be appropriate if the issue is simple and the amount involved is small).

The learned Senior Assistant Registrar did not adopt course (a). If she had done that, then the judge who would eventually have tried the issue could pursuant to Order 34 rule 9 have directed that the issue be tried without pleadings, could have directed who should be plaintiff and who defendant, and the garnishee would have had the advantage of discovery, inspection, interrogatories and such like.

Instead the learned Senior Assistant Registrar adopted course (b). It was said on behalf of the judgment creditor before us that consent on the part of the garnishee could be express or implied, that the conduct of the garnishee before the Senior Assistant Registrar amounted to implied consent and that accordingly the Senior Assistant Registrar had jurisdiction to do what she did.

It is true that the Senior Assistant Registrar would have had jurisdiction to do what she did if the parties had consented. But here the garnishee was not represented, the amount involved is large and it cannot be said that the conduct of the garnishee, who was not then represented, amounted to consent. In view of the large amount involved, it would have been different if it had been explained to the garnishee that the issue of indebtedness could have been tried by a judge in open court or by the Senior Assistant Registrar in chambers and if on being asked whether it would consent to the latter procedure it had consented. Accordingly in our opinion, in the circumstances of this case the learned Senior Assistant Registrar had

A no jurisdiction to try the issue in dispute. We allowed the appeal, set aside the order of the Senior Assistant Registrar and the appellate judge, and directed that the issue of liability of the garnishee be referred to a judge for trial. The costs of this appeal to be costs in the cause. The appellant's deposit to be returned to the appellant.

B

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

UNITED MALAYAN BANKING CORP. BHD. v. DATUK SRI CHAN SWEE HO & ORS.

C

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim and Chang Min Tat F.JJ.)

November 15, 1977 and January 25, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 65 of 1977]

Practice and Procedure — Application to set aside judgment in default — Service of writ — Posting on business premises — Good defence on merits — Allegation that defendant was nominee of another person in loan agreements — Personal liability of defendant.

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In this case the appellants had obtained judgment in default against the respondent in his claim for \$1,500,000 due on an overdraft granted to the respondent. The judgment was set aside in the High Court on the ground that the regularity of the judgment was questionable (a) as the proceedings had not been sufficiently brought to the attention of the respondent and (b) the respondent had a good defence on the merits. The writ had been served by posting at the business address of the respondent. The respondent alleged that he was the nominee of another person in the loan agreements and, if given leave to defend, he would make the other person a third party.

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Held, allowing the appeal: (1) in the circumstances of the case the writ was properly served by posting at his business address;

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(2) if as the respondent claimed he was a nominee of the other person but in borrowing from the appellants he was contracting in his own name as principal, he was nevertheless liable personally.

Cases referred to:-

- (1) *Mootiah Chitty v. Palaniappa Chitty* (1897) 5 S.S.L.R. 51.
- (2) *Kavena Said Meydin v. Komurappa Chitty* (1909) 11 S.S.L.R. 70.
- (3) *Ching Yung Tung v. Bep Aketik* [1978] 1 M.L.J. 211.

G

FEDERAL COURT.

T. Hepworth for the appellants.

N.T. Rajah for the respondent.

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Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the order of the High Court in Penang setting aside the judgment entered by the appellants against the respondent in default of appearance.

The appellants are bankers and claimed against the respondent and two others jointly and severally a sum of \$1,500,000 on an overdraft granted to the respondent on his application and guaranteed jointly and severally by the 2nd and 3rd defendants. At the taking out of the writ, the sum had with the agreed interests increased to \$1,875,737.42c.

The default judgment was entered on October 15, 1976 after the respondent had been served by substituted service. The respondent applied by summons-in-chambers on October 27, 1976 to set aside the judgment on two grounds. First, it was alleged that